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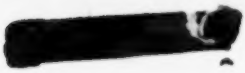

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ALEXANDER L. STEVAS,
CLERK

Case No. ____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

RALPH DAVIS, individually, CHESTER BLAKEMORE, officially as the Director of the Department of Highway Safety and Motor Vehicles; and J. ELDREDGE BEACH, individually and as Director of the Florida Highway Patrol, Department of Highway Safety and Motor Vehicles, Appellants,

v.

GREGORY SCOTT SCHERER, Appellee.

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

MOTION TO DISMISS OR AFFIRM

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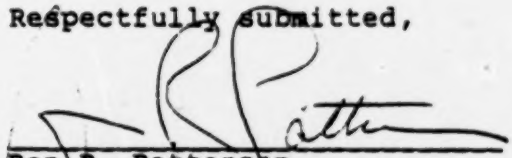
MOTION TO DISMISS OR AFFIRM

Appellee in the above-entitled case moves this Court to dismiss or affirm this Appeal under Rule 16.1C of the Rules of this Court, on the grounds that the federal questions raised do not present substantial federal questions, or that the decision is a correct one primarily based on findings of fact in an individual case made by the trial court and accepted by the Circuit Court of Appeals.

Respectfully submitted,



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III.

PROCEEDINGS BELOW AND THE FACTS

The Plaintiff below, the Appellee here, Gregory S. Scherer, was employed as a Radio-Teletype Operator with the State of Florida Department of Highway Safety and Motor Vehicles, Division of Florida Highway Patrol, Troop A, as of January 13, 1975.

On August 26, 1977, he requested approval of his Troop Commander, Capt. K.S. Sconiers, to work as an Escambia County Sheriff's Reserve Deputy. On September 1, 1977, Capt. Sconiers notified the Plaintiff/Appellee that he had permission to accept part-time employment as an Escambia County Sheriff's Reserve Deputy. Relying on this letter of approval, he purchased a uniform and a

pistol and was employed part-time as an Escambia County Sheriff's Reserve Deputy, assigned with other such officers to guard the set of the movie "Jaws II".

On September 23, 1977, Capt. Sconiers informed the Plaintiff/Appellee " . . . the Department feels that it would be of the best interest to our Department for you not to accept this employment; therefore, your request . . . is denied at this time."

Troopers E.D. Sapp and S.R. Bevis of Troop A (Sconiers' Troop) also requested authorization to work secondary employment as security personnel on the Universal Studio set in Santa Rosa County. They received approval which was never revoked.

In October, 1977, Mr. Scherer was requested to resign his work as a Reserve Deputy. Since he was never informed of

any conflict between his employment as a security person on the Jaws II set, and his immediate superiors testified at trial they knew of no conflict, he declined to do so. Capt. Sconiers, on October 12, 1977, wrote to the Defendant, J.E. Beach, and recommended that Mr. Scherer be suspended for three days for violation of the Department's dual employment policy.

By certified letter dated October 24, 1977, and received by Plaintiff/Appellee on October 25, 1977, Scherer was terminated from his FHP employment, effective October 20, 1977. At no time prior to the letter of termination was the Plaintiff/Appellee given notice in writing of a proposed discharge or an opportunity to respond verbally or in writing to the officials charged with making the termination decision, the Defendant Beach

and Defendant Davis.

The trial court found that there was no evidence of any affidavit or statement given or made to Defendants Beach or Davis which showed or purported to show that the Plaintiff's/Appellee's outside employment conflicted in any manner with his duties as a Radio-Teletype Operator for the Florida Department of Highway Safety and Motor Vehicles, Division of Florida Highway Patrol. The choice to dismiss, rather than suspend Scherer, was in violation of the Department's own disciplinary guidelines.

On November 10, 1977, the Plaintiff/Appellee, pursuant to Florida statutory scheme providing for a hearing on dismissal for Career Service employees, filed an appeal against his dismissal with the Florida Career Service Commission,

claiming he had been dismissed without just cause because his dismissal was pursuant to a rule not validly adopted by the Department. By letter dated July 13, 1978, the Plaintiff/Appellee was notified that his appeal against dismissal would be heard by the Career Service Commission on August 4, 1978. On August 10, 1978, the Career Service Commission entered its order approving a stipulation and agreement between the Department of Highway Safety and Motor Vehicles and the Plaintiff/Appellee which reinstated the Plaintiff/Appellee to his position of employment, and afforded him partial back pay.

Thereafter, the Plaintiff/Appellee, Gregory Scherer, filed an action premised on the denial of due process in the United States District Court for the Northern

District of Florida. He sought damages for his emotional distress, and a declaratory judgment that the statute and its implementing rules and regulations were unconstitutional since they did not provide for a meaningful hearing at a meaningful time.

The Appeals Coordinator of the Career Service Commission, Dorothy B. Roberts, testified that she had been so employed for a period of ten (10) years. She provided from statistical reports of that agency the average time between acceptance of appeal and date of hearing as follows:

Month	Average Time Between Acceptance of Appeal and Date of Hearing
July, 1978	185.909 days
August, 1978	205.27 days
September, 1978	314.15 days
October, 1978	162.3 days

November, 1978	180.1 days
December, 1978	357.00 days
January, 1979	266.8 days
February, 1979	258.83 days

She also stated that the Career Service Commission took an additional period of time following the hearing to file their written order. Her testimony was that if the written order reversed the agency's action, and ordered a discharged employee reinstated, the reinstatement would not be automatic and the agency could appeal the action to the District Court of Appeal. During the pendency of that appeal, the order of the Career Service Commission would be stayed.

Testimony was adduced from C.W. Johnson, President of the Florida Highway Patrol Charter of the Florida Police Benevolent Association, that the appeal of

a Marcus McGowan, which was heard in November, 1978, by the Career Service Commission (CSC), and which was appealed by the Department of Highway Safety and Motor Vehicles to the District Court of Appeal following reversal by the CSC of the agency's decision to discharge McGowan, was still pending in the Court of Appeals as of the date of the trial, April, 1981, and Mr. McGowan had not been returned to his employment with the Department of Highway Safety and Motor Vehicles.

An award of back pay, if the Career Service Commission did not find just cause, was not guaranteed according to Mrs. Roberts. Case law is supportive of that fact.

After trial, judgment was entered in favor of the Plaintiff/Appellee, Gregory

S. Scherer, in the sum of Four Thousand Two Hundred Dollars ($4,200.00). The court determined initially that the Defendants were not entitled to the qualified good faith immunity because the law was settled by Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sinderman, 408 U.S. 593 (1972); Arnett v. Kennedy, 416 U.S. 134 (1974); and Thurston v. Dekle, 531 F.2d 1264 (5th Cir. 1976). It also found that the dismissal decision of Beach and Davis violated the Department's own disciplinary guidelines, and, in an amended judgment, found that the Defendants violated the Florida Highway Patrol General Order No. 43.

The Defendants/Appellants Davis and Beach, appealed to the United States Circuit Court of the Eleventh Circuit. The Circuit Court of Appeals affirmed the

judgment on June 30, 1983, and denied the petition for panel rehearing on August 23, 1983.

The Defendants/Appellants filed a notice of appeal to this Court on or about August 31, 1983, and filed their jurisdictional statement with this Court on September 21, 1983.

In their jurisdictional statement, the Defendants/Appellants contend that the courts below erred in determining that Chapter 110, Florida Statutes (1981), and its implementing rules, are unconstitutional insofar as they fail to provide a prompt post-termination hearing since the statute was amended after the dismissal of the Plaintiff/Appellee. Engrafted upon this appeal is the question of the Defendants'/Appellants' entitlement to good faith immunity even if they did

violate the Plaintiff's/Appellee's rights under their own rules and regulations.

IV.

ARGUMENT

A. Summary of the Argument

The Plaintiff/Appellee sought damages and a declaratory judgment. The facts demonstrated the unconstitutionality of the statute and its implementing rules, insofar as they fail to provide a prompt post-termination hearing. Any defense that the Defendants may have as to mootness in the light of a post-termination amendment to the statute was waived by the failure of the Defendants/Appellants to present to the trial court and the appellate court below their argument that the 1981 law mooted

Plaintiff's/Appellee's claim, and, because in their footnote 13 of their initial brief to the appellate court below, they waived any such argument, and because the evidence clearly demonstrated the failure of the statute and its implementing rules to provide for a post-termination hearing at a meaningful time, the court's declaratory judgment was correct and the decision of the court below should be affirmed.

The Defendants'/Appellants' violation of state law, as found by the court below, is either a sufficient objective violation to preclude them from utilizing the good faith immunity defense, or it shows that they were acting outside their discretionary authority and that they were, for that reason, not entitled to good faith immunity.

In the alternative, the Defendants'/Appellants' invocation of this Court's jurisdiction under 28 U.S.C., Section 1254(2), acts to deny the Defendants'/Appellants' their opportunity to raise the question of the application of the good faith immunity doctrine.

This Court should summarily affirm the decision of the court below, as judgment is correct.

B. The Defendants'/Appellants' Failure to Present the Questions Raised Here to Either the Trial Court or the Appellate Court Bars Consideration of Those Issues by This Court

The trial court, in its judgment, stated in the context of this damage action that Chapter 110, Florida Statutes (1981), and its implementing rules, were unconstitutional insofar as they fail to provide a prompt post-termination hearing.

The Defendants, in their jurisdictional statement to this Court, have stated that:

> The statute which the District Court found unconstitutional, Chapter 110, Florida Statutes (1981), had not even been promulgated, let alone applied at the time of Appellee's termination in 1977. Thus no live dispute as to the statute's constitutionality existed, and this issue was not justiciable.

This contention is raised for the first time before this Court. Indeed, in footnote 13 of their brief to the United States Court of Appeals for the Eleventh Circuit, the Defendants said the statute under which Mr. Scherer was discharged had substantially the same wording as Chapter 110, Fla. Stat. (1981).

> 13. A memorandum opinion and order were entered in this case on July 15, 1981. (ROA, pp. 535-560). This order declared Section 110.061, Fla. Stat. (1977), unconstitutional because of

its failure to provide a prompt post-termination hearing, as well as declaring it unconstitutional on other grounds. The District Court receded from other grounds in its Order Amending Judgment. Section 110.061(2)(c), Fla. Stat. (1977), the section dealing with hearing rights, states: "an employee who is dismissed shall be entitled to a de novo fact finding hearing pursuant to subsection 120.57(1)." As the District Court noted in its order amending judgment, entered on June 7, 1982 (ROA, pp. 638-645), the Legislature repealed Section 110.061 in 1979. The Order Amending Judgment addressed Chapter 110, Fla. Stat. (1981) generally in regard to the post-termination hearing requirement even though Section 110.061 was the statute in effect at the time of Plaintiff's termination. Defendants' argument is addressed to the constitutionality of both sections since the wording is substantially the same.

(Emphasis added.)

Thus, the Defendants/Appellants waived any objection that they may have had based on a later-adopted statute which, if the language were different, would support their mootness argument.

Furthermore, the evidence presented demonstrated the inadequacy of the procedures available.

The Plaintiff/Appellee did not receive notice of his dismissal until after the date of his dismissal. He had to wait ten (10) months for his hearing. The Appeals Coordinator testified that the average time from date of appeal to date of hearing ranged from a low of six months to approximately one year. She also testified that following the hearing, the Commission took additional time to draft its order and if the employee was ordered reinstated by the Career Service

Commission, that order would be stayed in the event that the agency appealed from it. With the admission by the Defendants/Appellants that the wording of "both sections . . . is substantially the same", the court had no reason not to reach the constitutionality of Chapter 110 and its implementing rules and regulations for their failure to provide a prompt post-termination hearing.

The argument that Mr. Scherer had no "personal stake in the resolution" of this issue is contrary to the facts of this case. The cases cited by the Defendants/Appellants, Golden v. Zwickler, 394 U.S. 103 (1969); O'Shea v. Littleton, 414 U.S. 488 (1974); and Murphy v. Hunt, 455 U.S. 478 (1982), are inapposite. Those cases involved requests for declaratory and injunctive relief only.

In the instant case, Mr. Scherer sought and obtained damages. His dispute is alive today for his judgment remains unsatisfied.

The Defendants state a further reason to this Court that the declaratory relief ordered below is inappropriate. They state that a court must interpret a statute so as to render it constitutional, if at all possible. In light of the evidence presented here, though, the time lag between the termination date, the hearing, and reinstatement, support the determination, in the context of this litigation, that:

> Chapter 110, Florida Statutes (1981) and its implementing rules are unconstitutional insofar as they fail to provide a prompt post-termination hearing.

Because the Defendants/Appellants failed to present to the trial court and

the appellate court below their argument that the 1981 law mooted Plaintiff's claim, and, because in their footnote 13 of their initial brief to the appellate court below they waived any such argument, and because the dispute herein was alive at all times, and is alive now, Plaintiff/Appellee is entitled to an affirmance from this Court of the judgment below, pursuant to Rule 16.1C.

C. The Defendants' Violation of State Law Abrogates the Defense of Good Faith Immunity of the Defendants, Even If the Defendants' Failure to Provide Due Process to the Plaintiff Did Not Violate Clearly Established Federal Constitutional Law

The Plaintiff/Appellee disputes the contention of the Defendants that the conduct of the Defendants/Appellants did not violate clearly established federal constitutional law.

In Board of Regents v. Roth, 408 U.S. 564 (1972), this Court held that an employee with an objective expectancy to continued employment was entitled to a hearing on the issue of his discharge. In Armstrong v. Manzo, 380 U.S. 306 (1950), the Court held that the opportunity to be heard should be granted at a meaningful time and in a manner which is appropriate to the nature of the situation.

The trial court determined that the ten (10) months, which Mr. Scherer had to wait, was not a hearing granted at a meaningful time. The evidence presented by the Appeals Coordinator was to the effect that a hearing would not normally be held on an appeal until six (6) months to a year after the appeal had been lodged. For an employee dependent for survival on his wages to wait such an

extreme period of time before any hearing is granted is wholly inappropriate. It is, therefore, Mr. Scherer's contention that the Defendants' actions in denying him due process violated the settled law that flows from the decisions of this Court.

In denying him the process to which he was due, the Defendants/Appellants also violated their own rules. In this appeal, the Defendants/Appellants contend that a violation of state law, rules and regulations, should not preclude them from the protection of the good faith immunity defense. In so arguing, they interpret Harlow v. Fitzgerald, ___ U.S. ___, 102 S. Ct. 2727, 73 L.Ed.2d 396 (1982), narrowly. They broadly state that the objective test as to the application of good faith immunity rests:

> . . . solely in terms of whether the constitutional law was clearly established at the time of the conduct in question. See, Crowder v. Lash, 687 F.2d 996 (7th Cir. 1982); Clanton v. Orleans Parrish School Board, 649 F.2d 1084 (5th Cir. 1981); Jihaad v. O'Brien, 645 F.2d 556 (6th Cir. 1981); Jackson v. State of Mississippi, 644 F.2d 1142 (5th Cir. 1981). To consider agency regulations or state law is to contravene those decisions.

None of the cases cited by Defendants/Appellants involve a violation of any regulations or any allegation of any statutory or regulatory violation. In none of the cases cited was any evidence adduced as to any violation of state law, rules, or regulations. The cases cited were not parallel to the instant matter.

The Defendants' argument is a strained interpretation of Harlow. The Defendants/Appellants overlook the conjunction used by the Harlow court to

describe the objective component of the good faith immunity defense as violations of the "statutory and constitutional law".

Furthermore, the Defendants completely overlooked the language of this Court in Smith v. Wade, ___ U.S. ___, 5 U.S.L.W. 4407, 4414 (1983), in which the Court said that the official:

> . . .is protected from liability for mere negligence because of the need to protect his use of discretion in day-to-day decisions in the running of a correctional facility. See generally, Procunier v. Navarette, 434 U.S. 555 (1978); Wood v. Strickland, 420 U.S. 308 (1975). But the immunity on which Smith relies is co-extensive with the interest it protects. The very fact that the privilege is qualified reflects a recognition there is no societal interest in protecting those uses of a prison guard's discretion that amount to reckless and callous indifference to the rights and safety of the prisoners in his charge. Once the protected sphere of privilege is exceeded, we see no reason why state

> officers should not be liable for their reckless misconduct on the same basis as private tort feasors.

Here, a violation of the state rules and regulations was found. These Defendant state officers have exceeded their sphere of discretion. The immunity defense did not apply, and the courts below properly found that it did not apply.

The argument that other courts considering the objective component of good faith immunity have never looked to a violation of state rules, regulations, and statutes, ignores Williams v. Treen, 671 F.2d 892, 901 (5th Cir. 1982), and King v. Higgins, 702 F.2d 18, 21 (1st Cir. 1983).

Furthermore, the violation of statutes, rules and regulations demonstrates that these Defendants violated "the protected sphere of

privilege". Smith v. Wade, supra. A violation of this discretion denies them a right to the good faith immunity defense. Williams v. Treen, supra.

> If an official's conduct contravenes his own state's explicit and clearly established regulations, a subjective belief in the lawfulness of his action is per se unreasonable. We therefore find that insofar as the conditions of confinement at Angola contravened clearly established state law, a responsible official's belief in the lawfulness of those conditions was per se unreasonable and the defendants are not entitled to claim an immunity based on reasonable good faith. To hold otherwise would be to encourage official ignorance of the law.

Id. at 901. See also, Clark v. Taylor, 710 F.2d 4 (1st Cir. 1983); and Gagnon v. Ball, 696 F.2d 17, 19 n.3 (2d Cir. 1982).

In short, the court found that these Defendants violated their own rules, and in doing so violated the constitutional

rights of the Plaintiff/Appellee. They are not entitled to the benefits of the good faith immunity defense, for they either were not acting within their discretionary authority in taking the action that they did take against Mr. Scherer, or their violation of the rules of their own department is a sufficient objective violation to preclude them from utilizing the good faith immunity defense.

D. The Invocation of this Court's Jurisdiction Under 28 U.S.C., Section 1254, Acts to Deny the Defendants/Appellants Their Opportunity to Raise the Question of the Application of the Good Faith Immunity Doctrine

Section 1254(2) limits this Court's review "to the federal questions presented." The phrase, "the federal questions presented", should restrict the Court's review to the federal questions

presented by the invalidation of the state's statute and its implementing rules anad regulations, and not to all other federal questions that may be in this particular case. Professor Moore, in 12 Moore's Federal Practice, paragraph 435.01(2), says that:

> A narrow reading of the statute, which limits the court's review to consideration of the invalidation issue, would comport with the principle that statutes defining the court's obligatory jurisdiction should be read narrowly. In addition, if a party desires review of all the federal questions in the case, he may forego an appeal under Section 1254(2), and seek certiorari under Section 1254(1). The authors submit that the arguments in favor of a narrow reading of the statute are more cogent; and, therefore, that an appeal brought under Section 1254(2) should present for review only the question of the invalidation of the state's statute.

The Plaintiff/Appellee Scherer respectfully requests this Court to deny

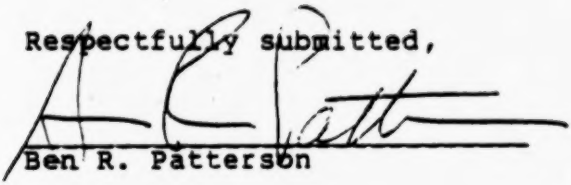
review of any question as to the application of the doctrine of good faith immunity, and to dismiss the appeal insofar as it seeks to have this Court review the good faith immunity issue.

V.

CONCLUSION

The questions raised on appeal here are so unsubstantial as not to need further argument. The judgment entered below was correct. The Plaintiff/Appellee respectfully requests this Court to affirm the judgment sought to be reviewed.

Respectfully submitted,



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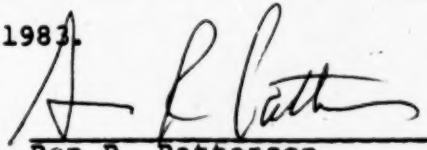
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished, by pre-paid United States Mail to Vicki G. Kaufman, Esq., Assistant Attorney General, Department of Legal Affairs, The Capitol, Suite 1501, Tallahassee, Florida 32301, this 20th day of October, 1983.



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